State Bar of Texas ADR Section

Alternative Resolutions Newsletter

Fall 2002 Issue

November 2002 Newsletter

CHAIR'S CORNER

by Deborah Heaton McElvaney, Chair, ADR Section

"Retreating To Our Purpose"

In the last "Chair's Corner," I reminded you of our Section's succinctly stated "purpose," which is found in Article I, Section 2 of the By-Laws of the State Bar of Texas Alternative Dispute Resolution Section: "to promote the use and quality of Alternative Dispute Resolution (ADR) in Texas." The Section's Council recently re-visited this stated "purpose," using it as the springboard of the Council's Fall 2002 retreat.

The Council met at South Shore Harbour in Clear Lake on September 27-28, 2002. While it was abundantly clear that the individual in charge of planning this retreat, *i.e.,* this Section Chair, had failed to factor into the equation the Gulf Coast hurricane season, Hurricane Isidore cooperated and moved ashore elsewhere, leaving us with absolutely glorious weather.

The turnout was inspiring. Of the seventeen current Council members, ten attended, with an eleventh one sick in her room the entire retreat. Seven of the eleven Past Chairs gathered around the conference table with the Council to provide, at the very least, "institutional memory." The group was capably and gently guided by facilitators Judy Corder and Mary Thompson, who certainly had their work cut out for them.

Utilizing a technique akin to herding cats, Judy and Mary helped us focus on the truly important considerations for this Council and Section, not only for this bar year, but for years to come. We collectively reviewed our past goals, objectives, and accomplishments, particularly keeping in mind that we had several new Council members in attendance who probably had no idea what they were taking on when they agreed to serve. We self-graded assignments put in place at last year's retreat, many of which were re-fashioned in the wake of 9-11. As we participated in guided discussion, small group activities, and some large group fun, we each felt the process unfold and take on a life of its own. No matter how far afield we sometimes meandered, Judy and Mary kept pulling us back to focusing on the reason for our Section's very existence: to promote the use and quality of ADR in Texas. Thus after hours of venting, sometimes arguing, but always considering each opinion expressed, the Council agreed upon three basic goals for this Section for this bar year, each of which plays a part in effecting our Section's "purpose": 1) to advance the field of arbitration by insuring fairness and educating consumers and practitioners in the use of the process; 2) to increase the use of ADR for conflict management outside the courtroom; and 3) to increase the Section's membership diversity and benefits.

Clearly, reaching these goals will not be an easy task. This Council cannot do it alone. It will take your spirit of volunteerism and commitment to make it happen. So, as you ponder exactly where you can best serve, keep in mind that the Section's "purpose" is a work in progress and that it is vulnerable to attack. For example, the October 2002 ABA Journal contains an article, "The Vanishing Trial," which proffers some explanations for the declining trend in civil trials over the last three decades. In particular, the author, Hope Viner Samborn, quotes critics of mediation and arbitration who point the finger at these processes as major contributors to the decline in civil trials, averring that arbitration and mediation "shroud verdicts in secrecy by eliminating public scrutiny and input," and "threaten the very constitutional core of the judicial system: the right to trial by jury."

While this Section has come so far in promoting the use and quality of ADR in Texas, each of us must re-commit to do what we can, individually or collectively, to stay the course. We, as ADR providers and users, cannot presume, assume, fall asleep at the wheel, bury our heads in the sand, nod off, become clueless, put blinders on, or engage in any other act of passivity that allows us to lose the ground we have fought so hard to attain.

ETHICAL PUZZLER

by Suzanne Mann Duvall

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, Texas Community Bank Building, 8235 Douglas Ave., #330 LB 61, Dallas, Texas 75225. Phone: 214.361.0802 FAX 214.368.7258]

Ordinarily, this column addresses hypothetical problems mediator might face. However, this issue we've tried something a little different. We asked four leading Texas Mediators to share with us their "real-life" examples of their most interesting ethical dilemmas aced in mediation and how (or if) they were able to resolve them.

Jeffry S Abrams (Houston): This was perhaps my darkest day in mediation. In one personal injury case I mediated a couple of years ago or so I had a discussion with the Defendant's attorney, in caucus, regarding the possibility that Defendant might stipulate to liability. I later discussed this with Plaintiff's attorney as a possible strategic risk. Upon learning that I discussed this with Plaintiff's attorney, Defense Counsel indicated that she had told me to keep that information confidential, as she didn't want Plaintiff's attorney to plead around the stipulation by adding a claim for gross negligence. I did not deny it and heaven knows, I have made a mistake or two in my life.

I apologized profusely and immediately returned the Defendant's mediation fee. I disclosed, with authority, the potential breach of confidentiality with the Plaintiff and Plaintiff's attorney and continued to attempt to get the case settled. It did not settle that day, though it got close. I believe the last demand was $17,000.00 and the last offer was $15,000.00. I continued to work on the case after the fact. About one week later, to the best of my recollection, I made a mediator proposal that Defendant pay $500.00 more and I offered to return my fee to Plaintiff's attorney. Between the two, the case settled. I was relieved and, frankly, lucky that the case was small enough where the return of my fee could make a difference. Fortunately, the problem hasn't arisen again because it's certainly a hard way to make a living.

Jill McKibben (Dallas): While working for the Carrolton Police Department, I co-mediated a dispute between a 15-year old habitual runaway (male) and his parents. During the mediation, it became clear to me that the parents refused to take normal adult responsibilities in the home. They also wanted to exploit the child to take care of chores well beyond his fair share and set up harsh and unreasonable disciplinary measures, insisting on the child's adherence to extremely rigid and conforming standards of behavior in and outside the home. The result was conflict from which the child continually avoided by running away. There was a cultural element to the problem, also, with the parents' position rooted in a traditional cultural and ethnic background that the child was moving away from and implicitly challenging. Specifically, the parents wanted their son to perform numerous household duties, to have no social contact with his peers, and top avoid wearing clothing of the current style. I saw these positions, taken together, as extreme and oppressive, and found it difficult not to argue as such on the child's behalf. The parents were indeed the stronger party and the child the weaker. My dilemma was to try to avoid an unfair agreement as well as an impasse due to the parents' "extreme" positions. Although the [arties all agreed to this mediation willingly, the child seemed ready to "cave in" and agree to his parents' oppressive solution.

Despite the ethic of nondirectiveness, I was inclined to see the parents' position as extreme, rigid, unfair and wrong. I found it difficult to refrain from pushing and challenging the parents because I have strong personal views about the parent-child relationship and because the perceived power imbalance in that relationship makes solicitude for the child a powerful and natural reaction.

If I gave expression to my views, however, I risked alienating the parents, losing any appearance of impartiality that would deprive the parties themselves of the opportunity to find a self-determined solution

(whether or not it appeared good to me). If I suppressed my views, however, I would have allowed and become party to what I saw as the oppression or exploitation of the child by the parent.

My concern, however, was what to do about the "unfair" demands. I raised questions about the workability and acceptability of the parents' positions, pointing out that the child in this case was establishing a pattern of running away from them already. I challenged these positions in as neutral terms as possible to avoid the urge of advocacy for the child. I avoided pushing for "fairer" terms of agreement and vetoing "unfair" agreements. By doing so, I avoided taking the solution out of the parties' hands.

It also helped having a co-mediator (a trained therapist) to assist in the mediation with continued reality checks of both sides. This helped keep the resolution to the conflict from being the current status quo. Each side was able to agree to a workable solution, and in the year that followed the mediation, the child had not run away from home so no further incidents were reported with this family.

Dawn Fowler (Dallas): After enduing a day of the usual problems that accompany trying to settle any hotly contested custody case, and after the Mediated Settlement Agreement was prepared, the wife asked her attorney what would happen if her husband was not the child's father. I was then asked to leave the room by the attorney. When I returned, I was then told by the wife's attorney that she was just joking.

In reviewing the Mediated Settlement Agreement with the husband and his attorney, I casually mentioned getting a solicitation in the mail from a DNA service that indicated all attorneys were in danger of a malpractice suit if they didn't insist on paternity testing in every case. Fortunately, a discussion followed in which the husband said he would not want to know if a child was not his biological child because of the bond that was already in place.

John Hughes (Fort Worth): Plaintiff, a paraplegic, brought in a case of questionable liability. After trying the case for a week, after the charge was prepared, but before it was presented to the jury, the judge ordered all parties to mediation. The underlying coverage had laid its million dollars on the table, but the excess coverage had refused to offer any money. There were two attorneys representing the plaintiff.

While I left to talk to the Defendants, the Plaintiff's attorney sent the client home. When I returned, I was left to deal with two lawyers and the representative of the client (wife). After telling the Plaintiff's lawyers where the Defendants were, the lead counsel got up and left the office. The assistant counsel was very disappointed, as he was afraid of what was going to happen in the case. I called the lead counsel to try and get him to come back but he would not. I neither called the court nor tackled the lawyer.

That poor client lost a million dollars that day and probably does not even realize it. I hope to learn from others on what I should have done. I did report however to the defendants what occurred. I felt that they, if they wish could talk to the judge or the co-counsel for the Plaintiff could talk to the judge. I did not feel it was my place to do so in that it would probably violate every confidentiality rule under which we exist.

If you have a "real-life" ethical dilemma, any comments you would like to share with our readers and/or please send them to me and they will be included in a future issue of *The Ethical Puzzler.*

2002 CALENDAR OF EVENTS

40-Hour Mediation ◆ Houston ◆ December 2-6, 2002 ◆ University of Houston Law Center ◆ A.A. White Dispute Resolution Center ◆ 713.743.2066 or www.law.uh.edu/blakely/aawhite

Ethical Negotiation and Mediation (Online Class) Register online at: http://www.texasbarcle.com/

40-Hour Basic Mediation Austin ◆January 6, -10, 2003 ◆ Center for Public Policy Dispute Resolution ◆The University of Texas School of Law ◆ 512-471-3507

Ethical Issues in Caucus Model Mediation ◆Austin ◆ January 14, 2003 ◆ 9:00 AM to 12:30 PM Corder/Thompson & Associates ◆ 512-458-4427 ◆ www.corderthompson.com

Transformative Mediation Training ◆Dallas ◆ February 28, 2003 ◆ Dispute Mediation Service ◆ (214)754-0022

Mediation Grievance Procedures: The Texas Experience ◆ Austin ◆ May 6, 2003 ◆ 9:00 AM to 12:30 PM Corder/Thompson & Associates ◆ 512-458-4427 ◆ www.corderthompson.com

Transformative Mediation Training ◆ Dallas ◆ May 9, 10, 16, 17, 2003 ◆ Dispute Mediation Service 9 AM to 5 PM ◆ (214)754-0022 ◆ www.dms-adr.org

And The Walls Came Tumbling Down

By Lue Dillard

In the May 30, 2002, decision authored by Chief Justice Tom Phillips, the Texas Supreme Court approved both the procedural provisions of Halliburton Company and Brown & Root's arbitration program, as well as the method by which the companies implemented the plan. *In re Halliburton Co. and Brown & Root Energy Serv.*, 2001 WL 1873035, 45 Tex. Sup. Ct. J. 720.[1]

Plaintiff James D. Myers worked for Brown & Root (now a subsidiary of Halliburton Company) for approximately thirty years. He sued Brown & Root in October 1999 in state district court, alleging racial discrimination. The trial court rejected Halliburton's motion to compel arbitration, setting the stage for examination on appeal of Halliburton's arbitration program. The Supreme Court rejected all four of Myers's reasons to avoid arbitration: 1) he was not bound by any agreement to arbitrate; 2) the promises given by the employer were illusory because the program could be modified or discontinued at any time; 3) the higher standard of "knowing agreement" should apply because statutorily protected rights are implicated; 4) the agreement was unconscionable.

Argument 1 After recounting the familiar, general principles of state contract law concerning the manner in which an employer may change the terms of an at-will employment contract – notice of the change and acceptance of the change – the Court determined that Myers had agreed to the arbitration program.

Argument 2 The Court ruled that the promises found to be illusory in *Light v. Centel Cellular Co.* did not apply here. *Centel* involved the validity of a covenant not to compete between an at-will employee and her employer. The Court also rejected Myers' assertion about the ability of the employer to modify or discontinue the program, citing protections built into the plan to protect claims already presented. The program provided any changes applied only to future disputes, and the program could not be terminated until ten days after reasonable notice of termination was given to employees.

Argument 3 Myers' contention that a higher standard should apply to his statutorily protected claim under the Texas Commission on Human Rights Act likewise was rejected. The Court held that applying the higher standard used in California[2] would undermine the principles of the Federal Arbitration Act favoring arbitration by allowing certain arbitration agreements – *e.g.,* of statutory claims – "to be declared unenforceable on some basis other than one required at law or in equity for contract revocation." A separate argument for applying the higher standard relied on the Equal Employment Opportunity Commission's policy disfavoring mandatory arbitration of discrimination claims. Pointing to United States Supreme Court precedent[3], the Texas Court declined.

Argument 4 The arbitration program is not unconscionable. The Court cited the provisions of the arbitration program that protect the employee's right to due process. Halliburton pays all the arbitration expenses except a filing fee of $50. Both parties select the neutral arbitrator. Halliburton provides $2500 for the employee to pay an attorney for consultation or representation. Discovery comports with that provided in the Federal Rules of Civil Procedure. And finally, the arbitrator is empowered to award reasonable attorney's fees to an employee who receives a favorable award, *even if the fees were not available in court*.

Justice Phillips articulated the features of an enforceable arbitration program:

Neutral arbitrator
More than minimal discovery
Written award
Allow all remedies available in court

Not require employee to pay either unreasonable costs or an arbitrator's fees or expenses.

Clearly, an arbitration program containing all of these features will pass muster in Texas. Query: how many of the blocks may be removed before the wall tumbles down?

FOOTNOTES—-

[1]This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

[2]In *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), the Court announced the standard of a "knowing agreement to arbitrate employment disputes" that would apply before an employee may be deemed to have waived rights under Title VII and related state statutes to a judicial determination of the employee's claim.

[3]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

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CASE LAW & LEGISLATION UPDATE

This is a column designed to keep members of the Section informed about cases and legislation affecting ADR. John Fleming, administers this column. (If you are aware of any case law or legislation which affects ADR please contact John at (512) 477-9300 or fax a copy of the case or legislation and/or the relevant citations to John Fleming, at Fax No. (512) 477-9302, or by e-mail at john@gcbmediators.com

Uniform Mediation Act. As of press time, no state has adopted the Uniform Mediation Act, and at this late date it is doubtful that any state will enact the measure in 2002. The lack of activity on UMA this year, however, is not necessarily indicative of what may happen in 2003. The state legislatures of at least seven states (including Texas) did not meet in 2002. In a number of the other states whose legislatures did meet, the "even year" sessions were short sessions and often focused primarily on budget issues. For these reasons, the National Conference of Commissioners on Uniform State Laws which is responsible for the Act, anticipates that 2003 will be a much better barometer to measure the nationwide success (or lack of success) of the UMA.

If there is any plan to introduce and pass the UMA in Texas, it is currently operating under the radar screen. There is certainly no detectable buzz in the Capitol offices about the bill except for that being made by the bill's opponents to preempt the bill from getting any traction. However, the landscape may be different when this newsletter hits your mailbox which will be after the November elections. At this writing, most legislators are concentrating on their reelection campaigns.

Arbitration. As the clock countdown for the 2003 Texas Legislative Session continues, the Texas House Civil Practices Committee is putting the final touches on its interim report on arbitration in consumer cases. The report should be released after the November elections. The expectation is that extensive new requirements will be recommended. Consumer and employee complaints about predispute binding arbitration clauses in adhesion contracts continue to increase across the country. California has passed a number of arbitration reform bills in 2002. The new disclosure guidelines imposed are so sweeping that there exists concern as to whether or not major arbitration service providers such as the American Arbitration Association, JAMS, and the National Arbitration Forum will be able to comply. In addition, some of the newly enacted legislation appears to be headed for challenge on the basis of Federal Arbitration Act preemption grounds.

In early October, the United States Senate passed a bill which limits the use of arbitration in franchise agreements between automobile dealers and automobile manufacturers. The bill is Section 11028 included in the Department of Justice Appropriations Act. Earlier versions of the bill have had success in the US House.

However, the more significant news from the Beltway may be the introduction of S. 3026, the Fairness in Arbitration Act by Senator Jeff Sessions (Republican, Alabama).

The bill would require the inclusion of certain bold print notices relating to the arbitration provisions contained in contracts; contains disqualification standards for arbitrators; imposes disclosure requirements on arbitrators; provides for "local venue" in most arbitration cases; and requires arbitrators to follow substantive law in rendering awards; as well as the imposition of numerous other procedural requirements. Of particular interest to the Texas ADR Section, the bill requires that arbitrators adhere to the Code of Ethics of the American Arbitration Act and of the State Bar of which the arbitrator is a member. The Texas Bar currently has no current ethical guidelines for arbitrators, but the ADR Section has charged the Arbitration Task Force to develop one for discussion.

Support for the Dispute Resolution Centers. At the request of the Alternative Dispute Resolution Section, the State Bar of Texas has made support for increased funding for the Dispute Resolution Centers part of its official legislative package. The Directors of the State Bar have approved reintroduction of last session's H.B. 1364. The proposed bill would amend Civil Practice and Remedies Code Chapter 152 to permit counties to increase the filing fee surcharge to support local Dispute Resolution Centers from $10 to $15 in cases filed in county and district level courts and to impose a $5.00 surcharge in cases in the justice of the peace courts.

BOOK REVIEW

Conflict Resolution Quarterly

Jossey-Bass

Reviewed by Mary Thompson

For all you mediators accumulating dusty piles of unread *Mediation Quarterly* and *Conflict Resolution Quarterly* journals, it's time to take another look (or maybe your first look) at one of the few professional journals in our field.

Conflict Resolution Quarterly is sponsored by the Association for Conflict Resolution(ACR) and is free to ACR members. Formerly *Mediation Quarterly*, this recently-transformed journal seeks to integrate practice, research and theory in the field of conflict resolution. Maintaining *Mediation Quarterly's* focus on third party dispute resolution, the new journal also reflects the national trend in the mediation field - expanding the focus to the broader area of conflict resolution.

Conflict Resolution Quarterly's expanded focus means exposure to a greater variety of dispute resolution topics. In recent issues one can find articles on community mediation in Singapore, factors distinguishing highly-rated family mediators, reconciliation in Northern Ireland, and integrating conflict resolution into classroom instruction. Following are examples of articles addressing practice, research and theory :

Practice. In "Lessons from Brief Therapy" (Spring 2002), Robert Dingwall and Gale Miller give examples of therapy techniques that can be appropriately used in mediation. The authors describe three types of questions and give practical examples of how to use each in a family mediation session.

Research. Jessica Katz Jameson looks at employees' attitudes towards organizational dispute resolution processes in "Employee Perceptions of the Availability and Use of Interest-Based, Rights-Based and Power-Based Conflict Management Strategies" (Winter 2001). A survey from 571 managers and non-managers from a variety of organizations found that although mediation was seen as "ideal" it was less likely to be seen as "realistic." The researchers provide a detailed discussion of the barriers to employee use of in-house mediation and the implications for both theory and practice.

Theory. In "Ethics and Field Building: The Chicken and the Egg" (Spring 2002) Frank Blechman suggests that "conflict resolution" is not yet a professional field due in part to the lack of standards and rigorous evaluation processes. Blechman concludes that "…it is time for our field outgrow our undisciplined adolescence, grow up and get a job."

Conflict Resolution Quarterly has two drawbacks for the mediation professional.
The expanded focus in some way assures that there will be less of interest to those wishing to focus specifically on mediation. And, as with any professional journal, even where the content of an article is of interest, the style of the writing may be deadly boring. That said, practitioners and trainers need to keep up with the changing shape of the profession. *Conflict Resolution Quarterly* provides a valuable overview of where the dispute resolution field is - and where it's going.

Conflict Resolution Quarterly
Jossey-Bass
(888) 378-2537 for Subscriptions
$65/Year

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Mary Thompson *is a mediator and mediation trainer based in Austin, Texas.*

EXPRESSIONS OF NEWS

MEDIATION WORKS INCORPORATED
December 2002 Divorce Mediation Training Program
December 6, 7, and 8, 2002 @ Suffolk Law School - Boston, MA Cost: $775 (or $725 if registered a month in advance) Training Prerequisites: Mediators and must have completed 30-hours of formal mediation training (or have met their state's requirement); Experience
Prerequisites: Although experience as a mediator is not required, experience mediating at least 10 cases within the past year is preferred. Please call 800-348-4888 x22 or visit www.mwi.org/training/divorce.html http://www.mwi.org/training/divorce.html for more information.

American Arbitration Association
2002 Mass Claims Colloquium, Dec. 10, NYC
December 10, 2002 9 am.-12 noon
Arbitration of Class Actions At a Crossroads-
A Panel Discussion of Recent Litigation, Legislation
and Case Strategies
Register Online: www.adr.org "Mass Claims Colloquium" Fee: $175 (reduced fee for AAA members and neutrals) Questions? Call Maureen Grady, Assistant Vice President of Mass Claims, AAA at 212-716-3984.

ZENA ZUMETA'S DIVORCE AND CUSTODY MEDIATION TRAINING

November 4-8, 2002 Chicago, Illinois
Center for Conflict Resolution
11 E. Adams Street, Suite 500

December 2-6, 2002 Ann Arbor, Michigan
Holiday Inn North Campus, 3600 Plymouth Road

April 23-25 and May 1-2, 2003 Ann Arbor, Michigan
Holiday Inn North Campus, 3600 Plymouth Road
August 4-8, 2003 Ann Arbor, Michigan
Holiday Inn North Campus, 3600 Plymouth Road

Register for any class online at www.learn2mediate.com http://www.learn2mediate.com, or call 1-800-535-1155

MEDIATORS TOUR TO CUBA
February 15 - 22, 2003
Tour package includes round-trip airfare from JFK; accommodations at five-star Hotel Nacional; all tours and excursions; interpreters and guides; airport transfers, US departure tax, health insurance, and Cuban visa. Space is limited, so call today! Vicki Lewin Ryder (585) 244-6759 vickiryder@juno.com < mailto:vickiryder@juno.com

Center for Dispute Resolution
Family and Divorce Mediation Certificate Program
A 40-hour basic training program approved by the
Academy of Family Mediators/Association for Conflict Resolution— March 4, 5, 6, 10 & 11, 2003 (312) 362-6300 dcolliso@depaul.edu
Visit our web site at www.lifelearn.depaul.edu/ocpe http://www.lifelearn.depaul.edu/ocpe
For Online Registration

BIENVENIDOS A SAN ANTONIO
CELEBRATE OUR 10th ANNIVERSARY

The Section of Dispute Resolution Annual Spring conference will occur in San Antonio, March 20-22, 2003 at the **Henry B. Gonzalez Convention Center and Hilton Palacio Del Rio.** Mark your calendar and plan to attend this premier dispute resolution event. Last year the Section's Spring meeting in Seattle, Washington was a tremendous success attracting over 1,200 participants. This Spring we will again provide a gathering place for dispute resolution leaders, providers, consumers, scholars, students, from small firms, universities, large law firms, corporations, accounting offices, psychologists' offices, and others that comprise the wonderful world of dispute resolution.

We plan to feature Optional Skills Training by Leading Practitioners on the Latest Innovations in DR Practice, the fourth Annual Legal Educators Colloquium in cooperation with the Association of American Law Schools, the fourteenth Annual Frank E. A. Sander Lecture, the second annual Mini-Conference on Court ADR, a one time special pre-conference event focused on expanding opportunities for minorities and women in dispute resolution, close to 120 sessions organized into practice and interest specific tracks and the presentation of the D'Alemberte/Raven Award during Friday's Luncheon.

September 11 Compensation Fund Special Master Kenneth Feinberg has agreed to deliver an exciting address on the work of his office and several other stimulating plenary sessions are in the works. All this plus a Friday night gala celebration of the tenth anniversary of the establishment of the ABA Section of Dispute Resolution.

Subject matter tracks this year will include: Arbitration, Community and Peer Mediation, Communication, Construction ADR, Corporate/Business ADR, Court-Connected ADR, Employment and Labor ADR, Ethics, Family, Government ADR, Environment & Public Policy, Intellectual Property and Entertainment, International, Practice Development and Management, and Technology.

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HELPING ATTORNEYS SEE BEYOND THE CASE: RETURN TO OBJECTIVITY

By
Michael S. Wilk and Henry J. Blum

Introduction

"Why do I need a mediator to help me settle my cases"? This was a question that mediators used to hear a lot. As mediation has become a standard part of litigation, this question is less frequently articulated. However, it still remains, even if it is not expressed. Although there are many ways to answer this question, from the trial lawyer's perspective, the most process-oriented response is that mediation allows counsel to make the shift between "litigation advocate" to "settlement advocate," while still preserving the relationship with their client.

A client hires a lawyer with the expectation that the lawyer will win the case. Typically, in the life of a lawsuit, the time comes when it is appropriate to make some compromise to settle the dispute. To settle the dispute the lawyer must shift from representing the client as a zealous advocate to representing the client as a diplomatic problem-solver. It may be difficult, however, for the client to appreciate the necessity for this shift in focus.

By using a mediator, the litigator remains the advocate for the client and the client's case, and the mediator can be the advocate for settlement.

When a client brings a new case (either plaintiff or defense) to his lawyer, typically, the first thing the lawyer does before accepting representation is conduct a detailed analysis of the strengths and weaknesses of the case. The evaluation usually includes an analysis of the law and facts, the availability and reliability of witnesses, costs and time likely to be expended on the case, and the impact of litigation on both the lawyer's practice and on the client's life and business.

After the case is signed up, lawyers often forget their initial evaluation and jump headfirst into the battle, going from fire to fire, litigating the case as zealous advocates of their client's position. By mediation day, both sides are firmly ensconced in their respective positions and, oftentimes, although they may wish to settle, don't know how to remove themselves from the case they have so painstakingly constructed. In order for a dispute to settle, a negotiated settlement must meet the legitimate interests of the client. But that is not enough. In order for the client to settle, her lawyer, who has taken up her banner in the battles of litigation, must now become an advocate for settlement. Part of the job of the mediator is to help the lawyers and the parties see beyond the case they have built so that they can more readily reach an agreement that resolves their disputes.

Three Stages of Litigation

Initial Stage – Preliminary Case Evaluation

Today is your lucky day. You are interviewing a prospective new client that feels he has been wronged or that someone has unjustly accused him of doing something wrong. In either event, he is ready and anxious to get justice. You, as an experienced and competent trial lawyer, view the situation with objective skepticism. Your analysis includes many issues, including the following:

Determination of whether the client will be a positive or negative for the case. How will the client hold up to the stress of litigation? Will your client appeal to the jury? What will the judge think of your client? Where is your client from? How is your client employed? Is your client married? Does your client have children? Is your client credible—is his story believable?

Review of the facts of the dispute. What is your client's story? What is the other side's version of the story? Who, what, where, when, and why?

Identification of the witnesses. What is their relationship with the claimant? Are the witnesses objective, believable, and available?

GATHERING OF OTHER EVIDENCE. IS THE EVIDENCE PERSUASIVE? IS IT ADMISSIBLE?

Calculation of the economic costs of litigation? How much time and expense will be incurred in preparing and presenting the case? What written discovery will be involved? How many depositions will be taken and defended? What motions are anticipated? What experts will be necessary? Will the experts survive challenge? What travel costs will be incurred? How much opposition is likely? How many lawyers and staff members will be required? Will the fee be hourly, flat fee, or contingent?

Calculation of the time required. How long will the case take to prepare and present? What will the time and costs be if your client or the opposition appeals?

Review of the legal issues. How strong is the case legally? Will the case be decided on the law?

At the meeting with the prospective client, you, of course, comply with your ethical duty of exploring the alternatives to litigation and possibly raise the subject of seeking a settlement of the controversy. You have learned over the years that this subject has to be handled carefully because the potential client has sought your assistance in advocating his interest and position and wants justice. He believes that he needs a fighter and not someone who wants to settle. You do not want to give the potential client the impression that you are not willing and anxious to redress the wrong that has been visited upon your client or address the wrong that is at the center of the accusation. Assuming that you accept the case, you move forward and prepare the case.

Second Stage — In the Trenches - Battle

You file the necessary pleadings and the process begins. You prepare your written discovery and respond to the other side's written discovery. Next, motions to compel, motions for more time, and hearings are set and reset. You schedule and reschedule and continue, but finally have hearings on the motions. Depositions are set and reset. Some depositions are completed and others are postponed. Motions for summary judgment are filed and probably denied. The case drags on, the client begins to ask questions about the time involved, and grows weary and impatient. You have a trial date and begin final preparation for trial.

Third Stage — Fight or Flight

You have come to realize that the facts are a little different than you originally thought, and that your client's story has a few holes. The fees and expenses are growing and are more than you originally estimated. Your client presses you for the percentage of success and has forgotten that you have advised him that litigation is risky. In fact, your client is "shocked" and "surprised" that he could lose. You revert to your initial objective skepticism. Your client's weaknesses are apparent to you, as well as your opposition's strengths. Trial is closing in. You would like to discuss settlement with the opposition but you (and your client) do not want to show any weakness or indication that you are worried about the case. Mediation is the process that will bring all of these issues together. Your client will have the opportunity to evaluate the case first hand. The mediator will help your client focus on the realities of his case, and the risks and uncertainties of a trial. You will have the time to objectively review the whole case and prepare for trial if the case does not settle.

The Three Stages of Mediation

Either the parties or the Court has decided that the time is right for mediation. The mediation has been scheduled and the parties, armed with their months or perhaps years of battle weary "second stage" posturing, arrive for the mediation. It is time to resolve the lawsuit, but there are obstacles.

In order to settle the dispute, the parties must return to the "First Stage" of litigation and re-engage in an objective analysis of the case, this time armed with everything that has been learned from the battlefields of litigation. This is not so easy! A lot of time has gone by. The lawyers have fought hard for their clients and their clients expect them to continue to be zealous advocates of their position. Clients expect their lawyer to be able to go to trial and to win! So, even if the lawyers wants to settle the case, the lawyers, for fear of appearing weak, may not be able to say to their clients, "let's settle."

In addition, the lawyers may be so firmly entrenched in the case they have constructed that they are simply unable to re-engage in an analysis that would objectively dictate that the case be resolved. It is the job of the mediator to create an environment and opportunity for the lawyers to see beyond the case they have built so that they can heroically help their clients make a business decision to resolve their disputes.

Each stage of the mediation loosely corresponds, in reverse order, to the stages of litigation discussed above, and each stage provides a unique opportunity for the mediator to help the lawyers and clients work together to develop a good business resolution to the conflict.

Opening Session – Bringing the neutral on board!

In the opening session, the mediator establishes himself as the advocate for resolution, sets the expectations of the day, and changes the tone from "battle" to mutual problem solving. The opening session provides the mediator with the opportunity to create a safe environment for open communication so that both sides can hear the other side's position directly without any sugar-coating or filtering. It also allows the mediator to let the parties know that the discussions during the day will explore the risks and costs of continued litigation. This puts the parties on the path of re-engaging in objective analysis.

By establishing himself as the advocate for resolution, the mediator allows counsel to maintain themselves in front of their client as the ready trial advocate. This allows counsel to continue the role that they were hired to play and retain the confidence their client has in their ability to win at the courthouse. Because of the conciliatory mood that the mediator has set, however, counsel is now able to begin the transition from trial advocate to advocate for strategic resolution.

Initial Private Caucuses: The Day in Court

The lawsuit has been evolving towards a trial. Though not a trial, mediation must provide an outlet for the respective sides to have their "trial" experience. Your client has a story to tell. He has been looking forward to proving to a jury that he is right and the other side is wrong. He has been anticipating how persuasive your arguments will be to the jury. He is convinced that when the jury hears his testimony and your presentation of the case, he will win. The case cannot be resolved until he has had his say and has heard your presentation. The initial caucuses provide that opportunity.

Mediation does not provide the opportunity for any given side to "win." So, it is important to provide the opportunity for your client to talk about his case. He needs to know that he has been heard and understood. By creating an opening for your client to freely discuss his view of the case and the impact it has had on his life, the mediator enables your client to have his day on the witness stand.

It is also important for your client to see that his lawyer is prepared and ready to win at the courthouse. By focusing on the strengths of your case during this first caucus, you are able to show your client that you are ready to try his case and your client is able to feel that he is bargaining from a position of strength.

The mediator can, at that point, introduce the possibility of risk by letting your client know that when he returns from visiting from the other side, he will discuss the other side's strengths, which will be your client's weaknesses.

Middle Caucuses (Objective Skepticism)

The middle caucuses provide the opportunity for the mediator to fully explore the risks of going to trial with the parties. In so doing, these caucuses also allow the mediator to facilitate the lawyer's transformation from "trial advocate" to "resolution advocate."

During these caucuses, the mediator will be discussing the factual and legal risks that both sides have. Because it is an objective third party raising the problems, the lawyer can realistically discuss with his client the issues that the mediator raises and adopt the role of problem solver. The client, therefore, sees his lawyer strategically working to resolve the problem in the best interest of his client. In addition, the client gets to work dynamically with his attorney to resolve the problem together.

Final Sessions (Third Stage – Fight or Flight – Don't Make It Any Worse)

You have made your presentation and your client has seen that you are prepared to go to trial. Your client has been able to talk about his case. He has had his "day in court." The risks have been explored and you and your client have brainstormed together on ways to best resolve the dispute. It is time to make a business decision.

At the beginning of the day, it would not have been possible to do this. Even if you had already concluded that it would be in your client's best interest to resolve the dispute, your client wasn't ready to settle. The mediation process has enabled your client to see the benefits of settling the lawsuit and has enabled him to work with you to resolve it in his best interests.

Conclusion

As mediators, our job includes assisting lawyers to serve their clients. We do this by providing a safe environment and by leading the lawyer and the client through the mediation process, enabling them to focus objectively on their case. Because of the nature of litigation, lawyers tend to lose objectivity as the case progresses. Most trial lawyers have confidence in their cases. In order to do so (i.e., to win), a lawyer must believe that he can win. This confidence is real and is ingrained in the lawyer and is conveyed to the client by the lawyer's words and actions. When a lawyer and a client come to mediation, they almost always have a biased opinion of their case and the likely outcome. The art of mediation is to help the lawyers and their clients see beyond the position they have created and objectively weigh the risks of their case. This enables the lawyers to help their clients to seize upon the unique opportunity that mediation provides. . .to powerfully resolve their dispute themselves.